

Montana Water Court  
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**FILED**  
07/07/2023  
Sara Calkins  
CLERK  
Montana Water Court  
STATE OF MONTANA  
By: D'Ann CIGLER  
43B-0189-R-2020  
Lambert, Kathryn  
5.00

MONTANA WATER COURT, YELLOWSTONE DIVISION  
YELLOWSTONE RIVER ABOVE AND INCLUDING BRIDGER CREEK BASIN  
BASIN 43B  
PRELIMINARY DECREE

\*\*\*\*\*

CLAIMANTS: Alan E. Fairchild; Marsha A. Fairchild

**CASE 43B-0189-R-2020**  
43B 37107-00  
43B 37108-00

**NOTICE OF FILING OF MASTER'S REPORT**

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's finding of fact, conclusion of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days to be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must mail a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

**MASTER'S REPORT**

The ditch identified on the abstract for each of these claims in the Preliminary Decree is Upland Ditch. During preparation of the Preliminary Decree, the point of diversion legal description was changed to the legal description for Mill Creek Flat Ditch, not for Upland Ditch. In 2021, the Montana Department of Natural Resources and Conservation ["DNRC"] prepared a new marked aerial photograph for the Mill Creek claimants and the Court to use to determine

the correct ditch name and point of diversion legal description. On April 5, 2023 the Order Re-Opening Case And Setting Filing Deadline was issued to address this error with the claimants. A copy of the new marked aerial photograph was included. On May 23, 2023 the claimants filed their response stating that the ditch historically used for these water rights is the Upland Ditch. These documents are viewable in the Court's FullCourt Enterprise case management system.

#### APPLICABLE LAW

A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content pursuant to section 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that the elements of the claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973. This is the burden of proof for every assertion that a claim is incorrect. Rule 19, W.R.Adj.R.

#### FINDING OF FACT

For both of these claims, the Preliminary Decree states that the point of diversion legal description is the NESWNE section 3, T6S, R9E, PARK. The legal description should be the NENENW section 3, T6S, R9E, PARK. The ditch name is already correctly appearing on these abstracts as Upland Ditch.

#### CONCLUSION OF LAW

The Statements of Claim, new DNRC marked aerial photograph, and response filed by the claimants are sufficient to contradict and overcome the prima facie claims as incorrectly modified prior to issuance of the Preliminary Decree.

#### RECOMMENDATIONS

Based upon the above Finding of Fact and Conclusion of Law, this Master recommends that the Court make the changes specified in the Finding of Fact to correct the Preliminary Decree for this Basin. A Post Decree Abstract of Water Right Claim for each claim is served with this Report to confirm the recommended changes have been made in the state's centralized record system.

#### **ELECTRONICALLY SIGNED AND DATED BELOW**

**Service Via Electronic Mail:**

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***Last Order:***

Alan E. Fairchild  
Marsha A. Fairchild  
119 Pray Rd  
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**Note: Service List Updated 6-29-23**

**POST DECREE**  
**ABSTRACT OF WATER RIGHT CLAIM**  
**YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK**  
**BASIN 43B**

**Water Right Number:** 43B 37107-00 STATEMENT OF CLAIM

**Version:** 5 -- POST DECREE

**Status:** ACTIVE

**Owners:** ALAN E FAIRCHILD  
119 PRAY RD  
LIVINGSTON, MT 59047 8708

MARSHA A FAIRCHILD  
119 PRAY RD  
LIVINGSTON, MT 59047 8708

**Priority Date:** JUNE 1, 1903

**Type of Historical Right:** DECREED

**Purpose (use):** IRRIGATION

**Irrigation Type:** SPRINKLER

**Flow Rate:** 282.80 GPM

**Volume:** THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

**Climatic Area:** 4 - MODERATELY LOW

**Maximum Acres:** 50.00

**Source Name:** MILL CREEK

**Source Type:** SURFACE WATER

**Point of Diversion and Means of Diversion:**

| <u>ID</u> | <u>Govt Lot</u> | <u>Qtr Sec</u> | <u>Sec</u> | <u>Twp</u> | <u>Rge</u> | <u>County</u> |
|-----------|-----------------|----------------|------------|------------|------------|---------------|
| 1         |                 | NENENW         | 3          | 6S         | 9E         | PARK          |

**Period of Diversion:** MAY 1 TO OCTOBER 31

**Diversion Means:** HEADGATE

**Ditch Name:** UPLAND DITCH

**Period of Use:** MAY 1 TO OCTOBER 31

**Place of Use:**

| <u>ID</u> | <u>Acres</u> | <u>Govt Lot</u> | <u>Qtr Sec</u> | <u>Sec</u> | <u>Twp</u> | <u>Rge</u> | <u>County</u> |
|-----------|--------------|-----------------|----------------|------------|------------|------------|---------------|
| 1         | 50.00        |                 | W2SE           | 19         | 5S         | 9E         | PARK          |

**Total:** 50.00

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**Remarks:**

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

37107-00

42487-00

AUTHORIZATION TO CHANGE ISSUED 06/24/1988 FOR CHANGE IN POINT OF DIVERSION. NOTICE OF COMPLETION DUE 11/30/1990.

LEASE AUTHORIZATION TO CHANGE THE POINT, PLACE, AND PURPOSE OF USE ISSUED 01/27/1993 TO THE DEPARTMENT OF FISH, WILDLIFE & PARKS. SEE 43B 5862-00.

**POST DECREE**  
**ABSTRACT OF WATER RIGHT CLAIM**  
**YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK**  
**BASIN 43B**

**Water Right Number:** 43B 37108-00 STATEMENT OF CLAIM

**Version:** 5 -- POST DECREE

**Status:** ACTIVE

**Owners:** ALAN E FAIRCHILD  
119 PRAY RD  
LIVINGSTON, MT 59047 8708

MARSHA A FAIRCHILD  
119 PRAY RD  
LIVINGSTON, MT 59047 8708

**Priority Date:** JUNE 4, 1963

**Type of Historical Right:** DECREED

**Purpose (use):** IRRIGATION

**Irrigation Type:** SPRINKLER

**Flow Rate:** 1.25 CFS

**Volume:** THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

**Climatic Area:** 4 - MODERATELY LOW

**Maximum Acres:** 50.00

**Source Name:** MILL CREEK

**Source Type:** SURFACE WATER

**Point of Diversion and Means of Diversion:**

| <u>ID</u> | <u>Govt Lot</u> | <u>Qtr Sec</u> | <u>Sec</u> | <u>Twp</u> | <u>Rge</u> | <u>County</u> |
|-----------|-----------------|----------------|------------|------------|------------|---------------|
| 1         |                 | NENENW         | 3          | 6S         | 9E         | PARK          |

**Period of Diversion:** MAY 1 TO OCTOBER 31

**Diversion Means:** HEADGATE

**Ditch Name:** UPLAND DITCH

**Period of Use:** MAY 1 TO OCTOBER 31

**Place of Use:**

| <u>ID</u> | <u>Acres</u> | <u>Govt Lot</u> | <u>Qtr Sec</u> | <u>Sec</u> | <u>Twp</u> | <u>Rge</u> | <u>County</u> |
|-----------|--------------|-----------------|----------------|------------|------------|------------|---------------|
| 1         | 50.00        |                 | W2SE           | 19         | 5S         | 9E         | PARK          |

**Total:** 50.00

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**Remarks:**

AUTHORIZATION TO CHANGE ISSUED 06/24/1988 FOR CHANGE IN POINT OF DIVERSION. NOTICE OF COMPLETION DUE 11/30/1990. SEE 43B 37107-00.

LEASE AUTHORIZATION TO CHANGE THE POINT, PLACE, AND PURPOSE OF USE ISSUED 01/27/1993 TO THE DEPARTMENT OF FISH, WILDLIFE & PARKS. SEE 43B 5862-00.